

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC 2002-090183

10/14/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT  
P. M. Espinoza  
Deputy

FILED: \_\_\_\_\_

MARK ALAN BROWN

CHARLES J SLACK-MENDEZ

v.

CHARLES R COHEN  
ARIZONA STATE DEPARTMENT OF  
INSURANCE

MARY E KOSINSKI

OFFICE OF ADMINISTRATIVE  
HEARINGS

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to A.R.S. § 11-808(G) and the Administrative Review Act, A.R.S. § 12-901, et seq. This case has been under advisement and the Court has considered and reviewed the record of the proceedings and the memoranda submitted by counsel.

This case represents an appeal from the Arizona Department of Insurance (ADOI) Director's order denying Plaintiff's application for an insurance producer's license. Although the Administrative Law Judge recommended granting the license, the Director rejected the ALJ's recommendation because he found that: 1) Plaintiff's misconduct, culminating in a felony conviction, was not an isolated event; 2) Plaintiff did not meet his burden to explain his failure to disclose his felony theft conviction to the Texas Department of Insurance which resulted in revocation of Plaintiff's Texas license; 3) Plaintiff failed to meet his burden of proof showing that he is qualified to hold the license notwithstanding the felony conviction and insurance license revocation; and 4) the risk to Arizona insurance consumers was not lessened by Plaintiff's intention to work with his wife, a licensed insurance producer.

The Plaintiff seeks review of the Director's Order and raises three issues for review. First, the Plaintiff argues that substantive and procedural due process of law requires that Plaintiff receive a fair trial in a fair tribunal. Second, the Plaintiff argues that the Director of Insurance acted in a biased, capricious and arbitrary manner in rejecting the Administrative Law Judge's

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recommendation. Third, the Plaintiff argues that the denial to grant him a license results in an excessive sanction.

## **1. Standard of Review**

On appeal of an administrative agency's decision pursuant to the Administrative Review Act, the Superior Court determines whether the administrative action was illegal, arbitrary, capricious, or was an abuse of discretion.<sup>1</sup> As to questions of fact, this court does not substitute its judgment for that of the administrative agency, but reviews the record only to determine whether substantial evidence supports the agency's decision.<sup>2</sup> Questions of statutory interpretation involve questions of law and this court is not bound by the administrative agency's conclusion.<sup>3</sup> This court may draw its own conclusions as to whether the administrative agency erred in its interpretation and application of the law.<sup>4</sup>

## **2. Substantive and Procedural Due Process**

The Plaintiff argues that the Director of Insurance rejected the ALJ's recommended order, a protected liberty interest, without being present at the administrative hearing or having reviewed the entire record. Therefore, the plaintiff argues, this denied him due process of law.

Contrary to the Plaintiff's assertion, he was not denied due process of law. Plaintiff contends that the Director violated his due process rights because he did not review the entire record prior to issuing his Order. Plaintiff assumes that because the ALJ's decision and the Director's order were so close in time that the Director could not have evaluated the record. Thus, the Plaintiff assumes that his due process rights were violated because when the Director rejected the ALJ's recommendation.

Neither the Plaintiff nor the Director's order indicates whether the Director reviewed the entire record; however, review of the record is not a necessary requirement to satisfy due process if the final adjudicator does not take responsibility for making the findings of fact.<sup>5</sup> In Stoffel, the Court of Appeals found that if the adjudicator reserves the responsibility for making findings of fact, due process requires an independent review of the evidence if the responsibility for making findings of fact is not reserved, due process is served if the final adjudicator defers to the findings of fact made by the hearing officer.

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<sup>1</sup> A.R.S. § 12-910(G), *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136 (App. 1991).

<sup>2</sup> *Petras v. Arizona State Liquor Board*, 129 Ariz 449, 452, 631 P.2d 1107 (App. 1981).

<sup>3</sup> *Seigal*, 167 Ariz. 401.

<sup>4</sup> *Carondelet Health Services v. Arizona Health Care Cost Containment System Administration*, 182 Ariz. 502, 504, 897 P.2d 1388 (App. 1995).

<sup>5</sup> *Stoffel v. Arizona Dept of Econ. Security*, 162 Ariz. 449, 784, P.2d 275 (App. 1989).

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In this case, no review of the record was necessary or required by due process because the Director adopted the ALJ's recommended Findings of Fact. The Director did not reserve the responsibility for making the findings of fact himself, instead, he deferred to the findings of the ALJ who was present to hear the evidence. The Director did not disagree with the findings of fact made by the ALJ, rather he disagreed with the inferences from the facts and conclusions of the ALJ.

### 3. Director's Order

The Plaintiff argues that the Director's bias, as the Plaintiff believed was evidenced in the Director's decision, was made in part, by speculated findings not supported by the evidence.

The Director's conclusion is supported by substantial evidence in the record. Plaintiff contends that the Director could not have concluded that the felony conviction reflects a crime involving dishonesty in financial dealings because the ALJ stated that the facts surrounding the conviction are somewhat clouded.

The ALJ's factual findings reflect that the Plaintiff plead guilty to a felony charge of Theft by Check and was ordered to pay restitution of \$15,000.<sup>6</sup> The ALJ also found that Plaintiff has two misdemeanor Insufficient Funds convictions.<sup>7</sup> The ALJ then made a conclusion that the age of the events without evidence of further malfeasance should not be a bar, when considered alone, to Plaintiff's being licensed.<sup>8</sup>

The Director disagreed with the ALJ's conclusion based on the same facts. He found, instead, that the facts demonstrated a pattern of misconduct related to dishonesty in financial dealings. This is not bias on the part of the Director. I concur fully with the Director's conclusion based upon the record before me. The Director also considered whether employment with Plaintiff's wife mitigated the risk to Arizona's insurance consumers.<sup>9</sup> The ALJ concluded on shockingly scant evidence that it would be unlikely that Plaintiff would violate insurance laws. The Director made a different (and more reasoned) inference, which does not make his decision arbitrary. The Director's inference is reasonable in light of his experience in insurance regulation. More importantly, the ALJ's conclusion appears naive and to have been made without critical evaluation of all the evidence, at best. Therefore, this Court holds that the Director did not act in a biased, arbitrary, or capricious manner.

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<sup>6</sup> R. Rev. 70, paragraph 5 at p. 1.

<sup>7</sup> R. Rev. 70, P. 6, at p. 2.

<sup>8</sup> R. Rev. 70, p. 4, para. 2.

<sup>9</sup> R.Rev. 71, p. 2, para. 4.

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**4. Excessive Sanctions**

The Plaintiff argues that the denial to grant him a license results in an excessive sanction. Plaintiff cites to cases in other jurisdictions where a felony convictions have not barred licensure by the state. These examples, the plaintiff cites, are illustrative of similar if not worse behavior and thus, he should be granted a license. However, other states' mistakes are not good precedent.

The Arizona Court of Appeals found that an administrative sanction is excessive only if it is so disproportionate to the offense as to shock one's sense of fairness.<sup>10</sup> The Director's denial of licensure in this case does not forever preclude the Plaintiff from practicing as an insurance producer in Arizona. The conclusion that the Plaintiff engaged in a pattern of criminal misconduct related to dishonesty in financial dealings as evidenced by his prior felony and misdemeanor convictions, is inescapable, and requires affirmative action to protect the interests of the public. The denial of the Plaintiff's license was not an excessive sanction shocking to one's sense of fairness, but a necessary and appropriate sanction by a responsible public official.

**5. Conclusion**

Pursuant to the Administrative Review Act, A.R.S. § 12-901, et seq., this Court shall affirm an agency action unless, after review, it concludes that the agency action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion. In this case, Plaintiff was afforded both procedural and substantive due process. The agency action was based on the facts of this case and is supported by substantial evidence with regard for the facts and circumstances in the case, and the interests of the public. The Arizona Department of Insurance Director's decision is not contrary to law, nor is it arbitrary or capricious.

IT IS THEREFORE ORDERED affirming the decision of the Arizona Department of Insurance.

IT IS FURTHER ORDERED denying all relief requested by Plaintiff, Mark Alan Brown.

IT IS FURTHER ORDERED that counsel for the Arizona Department of Insurance shall lodge an order consistent with this opinion no later than November 14, 2003.

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<sup>10</sup> *Schillerstrom v. State*, 180 Ariz. 468, 885 P.2d 156 (1994) citing *Bear v. Nicholls*, 142 Ariz. 560, 563, 691 P.2d 326, 329 (app. 1984).